

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-1
 PALO ALTO, CA 94303-4739
 650-494-1335 FAX: 650-494-1827
 Email: agenda@clrc.ca.gov



July 7, 2000

<i>Date:</i> July 20-21, 2000		<i>Place:</i> San Diego
July 20 (Thur.)	10:00 am – 5:00 pm	School of Law University of San Diego 5998 Alcala Park 619-260-4527
July 21 (Fri.)	9:00 am – 4:00 pm	
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please leave contact information at 650-494-1335 and you will be notified of any late changes.		
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov		
The California Law Revision Commission is a State Bar of California Approved MCLE Provider. This meeting is approved for 11.5 hours of MCLE credit.		

FINAL AGENDA*for meeting of the***CALIFORNIA LAW REVISION COMMISSION****Thursday, July 20**

1. MINUTES OF JUNE 22-23, 2000, MEETING (7/7/00)
2. ADMINISTRATIVE MATTERS
 - Election of Officers**
Memorandum 2000-45 (NS) (6/26/00)
 - Report of Executive Secretary**
3. 2000 LEGISLATIVE PROGRAM
 - Status of Bills**
Memorandum 2000-46 (NS) (7/7/00)
 - AB 2939 — Air Resources Technical Revisions [Study N-300]**
First Supplement to Memorandum 2000-46 (BH) (to be sent)
4. MECHANIC'S LIENS [STUDY H-820]
 - Memorandum 2000-47 (SU) (to be sent)

5. SEPARATION OF FUNCTIONS IN DMV HEARINGS [STUDY N-117]
Memorandum 2000-48 (NS) (6/27/00)
6. FAMILY CONSENT IN HEALTH CARE DECISIONMAKING FOR ADULTS
[STUDY L-4003]
Memorandum 2000-49 (SU) (to be sent)
7. RULES OF CONSTRUCTION FOR TRUSTS [STUDY L-605]
Consultant's Study
Memorandum 2000-50 (NS) (7/6/00)
8. ESTATE PLANNING DURING DISSOLUTION OF MARRIAGE [STUDY FHL-911]
Draft of Recommendation
Memorandum 2000-51 (BH) (6/28/00)
First Supplement to Memorandum 2000-51 (7/7/00)
9. EARLY DISCLOSURE OF VALUATION DATA AND RESOLUTION OF ISSUES IN
EMINENT DOMAIN [STUDY EM-458]
Memorandum 2000-56 (NS) (7/5/00)

☞ **Note: Items not completed on July 20 will be continued to July 21.**

Friday, July 21

10. UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT [STUDY B-501]
Memorandum 2000-44 (BH) (7/7/00)
11. CRIMINAL SENTENCING STATUTES [STUDY M-200]
Consultants' Report
Memorandum 2000-52 (BH) (7/7/00)
12. EVIDENCE CODE CHANGES REQUIRED BY ELECTRONIC COMMUNICATIONS
[STUDY K-500]
Consultant's Study
Memorandum 2000-53 (BG) (7/6/00)
13. AWARD OF COSTS AND CONTRACTUAL ATTORNEY'S FEES TO PREVAILING PARTY
[STUDY J-901]
Staff Draft Tentative Recommendation
Memorandum 2000-54 (BG) (to be sent)
14. CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION [STUDY J-1320]
Memorandum 2000-55 (BG) (7/7/00)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 20-21, 2000
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on July 20-21, 2000.

Commission:

Present: Howard Wayne, Assembly Member, Chairperson
Sanford M. Skaggs, Vice Chairperson
Joyce G. Cook
David Huebner

Absent: Bion M. Gregory, Legislative Counsel
Bill Morrow, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel

Consultants: James E. Acret, Mechanic's Lien Law (July 20)
Joseph B. Harvey, Evidence Code (July 21)
Gordon Hunt, Mechanic's Lien Law (July 20)
William M. McGovern, Probate Code (July 20)
Mark Overland, Criminal Law (July 21)
David Ross, Criminal Law (July 21)
David S. Wesley, Criminal Law (July 21)

Other Persons:

Sam Abdulaziz, Abdulaziz & Grossbart, North Hollywood (July 20)
Sherry Braheny, M.D., California Medical Association Council on Ethical Affairs, San Diego (July 20)
Eric Carlson, Bet Tzedek Legal Services, Los Angeles (July 20)
Peter C. Freeman, Lumber Association of California & Nevada, Barr Lumber, San Bernardino (July 20)
Ellen Gallagher, Contractors License Board, Sacramento (July 20)
Jan Hansen, Lumber Association of California & Nevada, Sacramento (July 20)
Keith Honda, Assemblyman Honda's Office, San Jose (July 20)
Deborah Mattos, Lumber Association of California & Nevada, Mattos & Associates, Sacramento (July 20)

Ronald Baker Miller, M.D., California Medical Association Association Council on Ethical Affairs, Anaheim Hills and Irvine (July 20)

Julie Montoya, Department of Motor Vehicles, Sacramento (July 20)

Gabor Morocz, Department of Motor Vehicles, Sacramento (July 20)

Susan L. Penney, California Medical Association, San Francisco (July 20)

Kenneth G. Petrusis, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Beverly Hills (July 20)

Stanley A. Terman, M.D., Peaceful Transitions, San Diego (July 20)

David Weston, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, La Jolla (July 20)

Norm Widman, Dixieline Lumber Co., San Diego (July 20)

Mark Wyland, Pine Tree Lumber Co., Escondido (July 20)

CONTENTS

Minutes of June 22-23, 2000, Meeting	2
Administrative Matters	2
Election of Officers	2
Report of Executive Secretary	3
2000 Legislative Program	3
Study B-501 – Uniform Unincorporated Nonprofit Association Act	3
Study Em-458 – Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain	5
Study H-820 – Mechanic’s Liens	5
Study J-901 – Award of Costs and Contractual Attorney’s Fees to Prevailing Party	7
Study J-1320 – Civil Procedure After Trial Court Unification	7
Study K-500 – Evidence Code Changes Required By Electronic Communications	16
Study L-4003 – Family Consent in Health Care Decisionmaking for Adults	17
Study M-200 – Criminal Sentencing Statutes	18
Study N-117 – Separation of Functions in DMV Hearings	19

MINUTES OF JUNE 22-23, 2000, MEETING

The Commission approved the Minutes of the June 22-23, 2000, Commission meeting as submitted by the staff.

ADMINISTRATIVE MATTERS

Election of Officers

The Commission considered Memorandum 2000-45, relating to election of Commission officers. The Commission elected David Huebner as Chairperson and Joyce G. Cook as Vice Chairperson for the term commencing September 1, 2000.

1 **Report of Executive Secretary**

2 The Executive Secretary reported that the appointments of Commissioners
3 Huebner and Cook have been unanimously confirmed by the Senate. The
4 Governor's office has not announced any new appointments to the Commission.

5 **2000 LEGISLATIVE PROGRAM**

6 The Commission considered Memorandum 2000-46 and its First Supplement,
7 relating to the Commission's 2000 legislative program. The Commission
8 approved the amendments and revised report on AB 2939 (air resources technical
9 revisions) as set out in the First Supplement.

10 **STUDY B-501 – UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT**

11 The Commission considered Memorandum 2000-44 and its First Supplement,
12 describing the Uniform Unincorporated Nonprofit Association Act and
13 discussing problems in the Uniform Act and in California law governing
14 unincorporated associations. The Commission made the following decisions:

15 (1) The staff will prepare a memorandum providing an
16 overview of California law governing unincorporated associations.
17 The memorandum will describe the relationship between
18 unincorporated nonprofit associations, unincorporated business
19 entities, and corporations (including corporations sole). It will also
20 discuss historical changes in the law of unincorporated associations
21 in California, in order to place existing law in its historical context.

22 (2) The staff will seek additional information from R. Bradbury
23 Clark of the Nonprofit and Unincorporated Associations
24 Committee of the State Bar, regarding his suggestion that the
25 Uniform Act should apply to for-profit unincorporated associations
26 and his suggestion that governance provisions be added to the law
27 of unincorporated associations.

28 (3) The staff will prepare a more detailed analysis of the
29 "business purposes and objects" limitation on ownership of
30 property by an unincorporated association, provided in
31 Corporations Code Section 20001.

32 (4) The staff will investigate whether there are any special tax
33 issues relating to unincorporated associations.

34 (5) The staff will prepare a more detailed analysis of the
35 definitions of "unincorporated association," "nonprofit
36 association," and "member" and attempt to standardize the

1 definition language used in provisions governing unincorporated
2 associations.

3 (6) There appears to be no need for substantive change to
4 Corporations Code Section 20002, relating to authority to engage in
5 property transactions on behalf of an unincorporated association.
6 The staff will inquire whether there are any problems with the
7 special provisions in that section that apply to benevolent or
8 fraternal societies and labor organizations.

9 (7) The staff will prepare draft legislation governing the
10 distribution of the property of an inactive unincorporated
11 association. The definition of “inactive” should be as clear as
12 possible and should include formal dissolution of the
13 unincorporated association. The rule should apply to both real and
14 personal property. Distribution of assets to members of the
15 association should be permitted where the association’s purpose is
16 analogous to that of a nonprofit mutual benefit corporation.

17 (8) The staff will prepare a more detailed analysis of the
18 common law bases for liability of a member for the contractual
19 obligations and torts of an association.

20 (9) The staff will investigate whether there are any special
21 insurance issues relating to unincorporated associations.

22 (10) An unincorporated association should have capacity to
23 participate in administrative proceedings and alternative dispute
24 resolution.

25 (11) The staff will investigate which types of judgments and
26 orders, other than money judgments, might be applied to an
27 unincorporated association.

28 (12) There appears to be no need for substantive change to
29 Corporations Code Section 24007, relating to service of process.

30 (13) There appears to be no need for substantive change to Code
31 of Civil Procedure Sections 395.2 and 395.5, relating to place of trial.
32 The staff will prepare a technical amendment to clarify the
33 relationship between the two sections.

34 Matters discussed in the memorandum that were not decided by the
35 Commission will be the subject of subsequent memoranda.

1 STUDY EM-458 – EARLY DISCLOSURE OF VALUATION DATA AND
2 RESOLUTION OF ISSUES IN EMINENT DOMAIN

3 The Commission considered Memorandum 2000-56 and its First Supplement,
4 relating to early disclosure of valuation data and resolution of issues in eminent
5 domain. The Commission revised the proposed amendment of Government
6 Code Section 7267.2 so that the copy of the appraisal provided by the public
7 entity to the property owner includes a concise summary of the appraisal. The
8 Comment to this provision should note that by including the summary as a part
9 of the appraisal, it is intended that the summary is treated the same as the
10 appraisal for admissibility purposes. The proposal should also preclude the
11 property owner from calling the public entity's appraiser who prepared the
12 appraisal as a witness. As so revised, the tentative recommendation should be
13 circulated for comment.

14 STUDY H-820 – MECHANIC'S LIENS

15 The Commission considered Memorandum 2000-47 and its First Supplement,
16 concerning draft proposals for reform of the mechanic's lien law at it pertains to
17 single-family, owner-occupied dwellings. The Commission reviewed the direct
18 pay notice and full-payment defense drafts, but did not approve either approach.
19 However, the Commission made a number of revisions in the draft statutes,
20 before considering other options:

21 **Direct Pay Notice**

22 *Draft Civ. Code § 3107.1. Scope of chapter*

23 The Commission reaffirmed its intent to limit the special consumer protection
24 rules inherent in the direct pay notice and full-payment defense drafts to single-
25 family, owner-occupied dwellings.

26 *§ 3107.2. Direct pay notice required to enforce lien*

27 Subdivision (a) needs to be reworded to avoid the implication that the
28 claimant would forfeit contract rights by using the direct pay procedure.

29 The notice rules in subdivision (c) should be tightened up because of the
30 consequences of the direct pay notice. Since people may go on vacation or move
31 out temporarily when their home is being remodeled, it is important to give
32 notice by first-class mail in the hope that it will be forwarded or otherwise reach

1 the owner. Consideration should be given to requiring notice to be sent both by
2 first-class mail and by registered or certified mail (return receipt requested).

3 Notice under subdivision (d) should also go to the customer of the
4 subcontractor or supplier. The statute should impose a duty to make a reasonable
5 effort to obtain accurate information about whom to serve and to give the
6 required notice. It may work to use the “reputed” owner, contractor, or
7 subcontractor concept applicable under the existing preliminary notice.

8 *§ 3107.3. Time to give direct pay notice*

9 This section should be revised for consistency with Section 3107.2 and should
10 not make effectiveness of the direct pay notice contingent on receipt by the
11 owner.

12 *Other Issues*

13 The Commission discussed other problems, including whether the direct pay
14 scheme should be limited to contracts of a certain total price or to a certain
15 amount of a subcontractor’s or supplier’s part of the job, whether prime
16 contractors could force subcontractors to waive the direct payment right,
17 whether subcontractors and suppliers would routinely give direct pay notices to
18 the same extent they now give preliminary notices and how owners would cope
19 with the challenge of making dozens of progress payments, and the need to
20 make clear that the owner’s failure to pay would not result in a breach of the
21 contract between a subcontractor or supplier and its customer.

22 **Full Payment Defense**

23 The reference to change orders in the introductory language should be
24 removed. The limitation in subdivision (b), that the owner does not have
25 knowledge of any dispute between the prime contractor and other claimants,
26 should be eliminated. Full payment of a good faith contract price should be
27 sufficient basis for the defense.

28 **Next Draft**

29 The Commission directed the staff to prepare a new draft statute that would
30 require a payment bond in the amount of 50% of the contract price for home
31 improvement contracts not exceeding \$25,000 (or other appropriate amount). The
32 staff should consider the home improvement contract definition in the
33 Contractors State License Law in developing this draft. An important issue in this
34 approach will be the availability of and premium on this type of payment bond.

1 In addition, the draft will need to address the problem of enforcing the bond
2 requirement and the consequences of failure to obtain the bond. The goal of
3 simplifying the law should be kept in mind.

4 The Commission briefly discussed mandating or encouraging use of joint
5 control agencies, but left consideration of this option for a later meeting. The
6 Commission noted receipt of Prof. J. Clark Kelso's "Homeowner's Relief
7 Recovery Fund" proposal, but time did not permit detailed consideration. The
8 staff will review this material and present it at a later meeting.

9 STUDY J-901 – AWARD OF COSTS AND CONTRACTUAL ATTORNEY'S
10 FEES TO PREVAILING PARTY

11 The Commission considered Memorandum 2000-54 concerning costs and
12 contractual attorney's fees. With regard to recovery by pro se litigants under
13 Civil Code Section 1717, the Commission decided:

14 (1) Where a contract includes a clause that permits a party to recover
15 nonstatutory litigation expenses in the event of litigation, a prevailing pro se
16 litigant (either an attorney or a nonattorney) should be entitled to recover such
17 expenses under the statute just like a prevailing party who is represented by
18 counsel.

19 (2) The Comment should point out that the amendment only addresses
20 recovery of nonstatutory litigation expenses by a pro se litigant, not recovery of
21 attorney's fees. The Comment should further explain that the amendment neither
22 codifies nor overturns *Trope v. Katz*, 11 Cal. 4th 272, 902 P.2d 259, 45 Cal. Rptr. 2d
23 241 (1995), and it is not intended to affect the development of the law on recovery
24 of attorney's fees by a pro se attorney under the statute.

25 STUDY J-1320 – CIVIL PROCEDURE AFTER TRIAL COURT UNIFICATION

26 The Commission considered Memorandum 2000-55 and its First Supplement,
27 concerning elimination of unnecessary procedural differences between limited
28 and unlimited civil cases. The Commission directed the staff to prepare and
29 circulate a tentative recommendation that is consistent with the following
30 decisions:

1 **Access to Court Records in Unlawful Detainer Cases (Code Civ. Proc. § 1161.2)**

2 The Commission agreed with the staff recommendation to leave this
3 provision as is. The tentative recommendation should not discuss this statute,
4 only provisions that the Commission proposes to revise.

5 **Change of Venue Within County (Code Civ. Proc. § 402.5)**

6 The Commission determined that issues relating to this provision should be
7 referred to the Judicial Council, for consideration in its study of superior court
8 sessions. See Gov't Code § 70219; *Trial Court Unification: Revision of Codes*, 28 Cal.
9 L. Revision Comm'n Reports 51, 84 (1998). Repeal of Code of Civil Procedure
10 Section 402.5 may be appropriate, because it is an interim provision to facilitate
11 unification. A Comment could be used to explain that the repeal is not intended
12 to alter the superior court's authority to control its work. The staff should point
13 this out in referring this matter to the Judicial Council.

14 **Confession of Judgment (Code Civ. Proc. § 1134)**

15 Code of Civil Procedure Section 1134 should be amended along the lines
16 proposed in the draft staff report that is attached to Memorandum 2000-55:

17 **Code Civ. Proc. § 1134 (amended). Entry of judgment**

18 SEC. _____. Section 1134 of the Code of Civil Procedure is
19 amended to read:

20 1134. ~~In all courts the~~ (a) The statement must be filed with the
21 clerk of the court in which the judgment is to be entered, who must
22 endorse ~~upon~~ on it, and enter a judgment of the court for the
23 amount confessed with the costs ~~hereinafter set forth~~ provided in
24 subdivision (b).

25 (b) At the time of filing, the plaintiff shall pay as court costs that
26 shall become a part of the judgment the following fees: fifteen
27 dollars (\$15) ~~or in a limited civil case ten dollars (\$10)~~. No fee shall
28 be collected from the defendant. No fee shall be paid by the clerk of
29 the court in which a confession of judgment is filed for the law
30 library fund nor for services of any court reporter.

31 (c) The statement and affidavit, with the judgment endorsed
32 thereon, together with the certificate filed pursuant to Section 1132,
33 becomes the judgment roll.

34 **Comment.** Section 1134 is amended to divide the section into
35 subdivisions and to eliminate the \$10 filing fee for a limited civil
36 case. Under this amendment, the filing fee is \$15 regardless of the
37 jurisdictional classification of the case.

38 The reference to "all courts" in subdivision (a) is deleted as
39 obsolete. It derived from an era when a confession of judgment

1 might have been entered in any of several courts, depending on the
2 amount of the judgment and the jurisdiction of the court. Cf.
3 Section 1132(a) ("Such judgment may be entered in any court
4 having jurisdiction for like amounts").

5 The attorney's certificate is made part of the judgment roll in
6 subdivision (c). The certificate is a prerequisite to entry of judgment
7 and must be filed with the defendant's written and verified
8 statement. Section 1132(b).

9 **Costs Where Recovery Is Small (Code Civ. Proc. § 1033)**

10 Issues relating to this provision should be addressed in the Commission's
11 study of costs and contractual attorney's fees.

12 **Installment Judgments (Code Civ. Proc. § 582.5)**

13 The Commission agreed with the staff recommendation to leave Code of Civil
14 Procedure Section 582.5 as is. The Commission also directed, however, that the
15 tentative recommendation include a general provision stating that the existence
16 of a statute relating to the authority of the court in a limited civil case does not,
17 by itself, imply that the same authority does or does not exist in an unlimited
18 civil case.

19 **Pleading Personal Injury and Wrongful Death Damages (Code Civ. Proc. §§**
20 **425.10, 425.11)**

21 Code of Civil Procedure Sections 425.10 and 425.11 should be amended along
22 the lines proposed in the draft staff report that is attached to Memorandum 2000-
23 55:

24 **Code Civ. Proc. § 425.10 (amended). Contents of complaint**

25 SEC. _____. Section 425.10 of the Code of Civil Procedure is
26 amended to read:

27 425.10. A complaint or cross-complaint shall contain both of the
28 following:

29 (a) A statement of the facts constituting the cause of action, in
30 ordinary and concise language.

31 (b) A demand for judgment for the relief to which the pleader
32 claims to be entitled. If the recovery of money or damages be is
33 demanded, the amount thereof demanded shall be stated, unless
34 the action is brought ~~in the superior court~~ to recover actual or
35 punitive damages for personal injury or wrongful death, in which
36 case the amount thereof demanded shall not be stated, ~~except in a~~
37 limited civil case.

1 **Comment.** Section 425.10 is amended to conform the pleading
2 requirements in limited and unlimited civil cases. Technical
3 changes are also made for conformity with preferred drafting style.

4 **Code Civ. Proc. § 425.11 (amended). Statement of damages**

5 SEC. _____. Section 425.11 of the Code of Civil Procedure is
6 amended to read:

7 425.11. (a) As used in this section:

8 (1) “Complaint” includes a cross-complaint.

9 (2) “Plaintiff” includes a cross-complainant.

10 (3) “Defendant” includes a cross-defendant.

11 (b) When a complaint is filed in an action ~~in the superior court~~
12 to recover damages for personal injury or wrongful death, the
13 defendant may at any time request a statement setting forth the
14 nature and amount of damages being sought, ~~except in a limited~~
15 ~~civil case.~~ The request shall be served ~~upon~~ on the plaintiff, who
16 shall serve a responsive statement as to the damages within 15
17 days. In the event that a response is not served, the party
18 ~~defendant,~~ on notice to the plaintiff, may petition the court in which
19 the action is pending to order the plaintiff to serve a responsive
20 statement.

21 (c) If no request is made for the statement referred to in
22 subdivision (a), the plaintiff shall serve the statement on the
23 defendant before a default may be taken.

24 (d) The statement referred to in subdivision (b) shall be served
25 in the following manner:

26 (1) If a party has not appeared in the action, the statement shall
27 be served in the same manner as a summons.

28 (2) If a party has appeared in the action, the statement shall be
29 served ~~upon his or her~~ on the party's attorney, or ~~upon~~ on the party
30 if ~~he or she~~ the party has appeared without an attorney, in the
31 manner provided for service of a summons or in the manner
32 provided by Chapter 5 (commencing with Section 1010) of Title 14
33 of Part 2.

34 (e) The statement referred to in subdivision (b) may be
35 combined with the statement described in Section 425.115.

36 **Comment.** Section 425.11 is amended to conform to the
37 pleading requirements of limited and unlimited civil cases. See
38 Section 425.10. Technical changes are also made for conformity
39 with preferred drafting style.

40 **Satisfaction of Judgment (Code Civ. Proc. § 685.030)**

41 Code of Civil Procedure Section 685.030 should be amended along the
42 following lines:

Code Civ. Proc. § 685.030 (amended). Satisfaction of judgment

SEC. _____. Section 685.030 of the Code of Civil Procedure is amended to read:

...

(e) ~~In a limited civil case, the~~ The clerk of a court may enter in the Register of Actions a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified ~~on~~ in the writ, is fully collected and only an interest deficit of no more than ten dollars (\$10) exists, due to automation of the continual daily interest accrual calculation.

Comment. Subdivision (e) of Section 685.030 is amended to eliminate the difference in treatment between limited and unlimited civil cases.

For the register of actions in superior court, see Gov't Code §§ 69845, 69845.5. For the register of actions in municipal court, see Code Civ. Proc. §§ 1052, 1052.1.

Statement of Jurisdictional Facts (Code Civ. Proc. § 396a)

Issues relating to Code of Civil Procedure Section 396a and the substantive provisions referenced in that statute (Civ. Code §§ 1812.10, 2984.4; Code Civ. Proc. §§ 395(b), 1161) should not be addressed in the tentative recommendation. The staff should prepare further discussion and analysis of these provisions for the October meeting.

Undertaking for Writ of Attachment or Protective Order (Code Civ. Proc. § 489.220)

Code of Civil Procedure Section 489.220 should be amended along the lines proposed in the draft staff report that is attached to Memorandum 2000-55:

Code Civ. Proc. § 489.220 (amended). Undertaking for writ of attachment or protective order

SEC. _____. Section 489.220 of the Code of Civil Procedure is amended to read:

489.220. (a) Except as provided in subdivision (b), the amount of an undertaking filed pursuant to this article shall be ~~two thousand five hundred dollars (\$2,500) in a limited civil case, and seven thousand five hundred dollars (\$7,500) otherwise~~ ten thousand dollars (\$10,000).

(b) If, ~~upon~~ on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, it shall order the amount of the undertaking increased to the amount it determines to be the

1 probable recovery for wrongful attachment if it is ultimately
2 determined that the attachment was wrongful.

3 **Comment.** Section 489.220 is amended to provide for a single
4 attachment undertaking, regardless of the jurisdictional
5 classification of the case.

6 **Undertaking of Creditor in Third Party Claims (Code Civ. Proc. §§ 720.160,**
7 **720.260)**

8 Code of Civil Procedure Sections 720.160 and 720.260 should be amended
9 along the lines proposed in the draft staff report that is attached to Memorandum
10 2000-55:

11 **Code Civ. Proc. § 720.160 (amended). Undertaking by creditor**
12 **where third party claims ownership or possession**

13 SEC. _____. Section 720.160 of the Code of Civil Procedure is
14 amended to read:

15 720.160. (a) If the creditor files with the levying officer an
16 undertaking that satisfies the requirements of this section within
17 the time allowed under subdivision (b) of Section 720.140:

18 (1) The levying officer shall execute the writ in the manner
19 provided by law unless the third person files an undertaking to
20 release the property pursuant to Chapter 6 (commencing with
21 Section 720.610).

22 (2) After sale, payment, or delivery of the property pursuant to
23 the writ, the property is free of all claims of the third person for
24 which the creditor has given the undertaking.

25 (b) Subject to Sections 720.770 and 996.010, unless the creditor
26 elects to file an undertaking in a larger amount, the amount of the
27 undertaking filed by the creditor under this section shall be in the
28 amount of:

29 ~~(1) Except as provided in paragraph (2), seven thousand five~~
30 ~~hundred dollars (\$7,500), or twice the amount of the execution lien~~
31 ~~as of the date of levy or other enforcement lien as of the date it was~~
32 ~~created, whichever is the lesser amount.~~

33 ~~(2) In a limited civil case, two thousand five hundred dollars~~
34 ~~(\$2,500), ten thousand dollars (\$10,000), or twice the amount of the~~
35 ~~execution lien as of the date of levy or other enforcement lien as of~~
36 ~~the date it was created, whichever is the lesser amount.~~

37 (c) An undertaking given by the creditor under this chapter
38 shall:

39 (1) Be made in favor of the third person.

40 (2) Indemnify the third person against any loss, liability,
41 damages, costs, and attorney's fees, incurred by reason of the
42 enforcement proceedings.

1 (3) Be conditioned on a final judgment that the third person
2 owns or has the right of possession of the property.

3 (d) If the creditor is a public entity exempt from giving an
4 undertaking, the public entity shall, in lieu of filing the
5 undertaking, file with the levying officer a notice stating that the
6 public entity opposes the claim of the third person. When so filed,
7 the notice is deemed to satisfy the requirement of this section that
8 an undertaking be filed.

9 **Comment.** Section 720.160 is amended to provide for an
10 undertaking of \$10,000 (or twice the amount of the execution lien,
11 whichever is less), regardless of the jurisdictional classification of
12 the case. The \$10,000 undertaking amount is the same as the
13 amount of an attachment undertaking. See Section 489.220
14 (attachment undertaking).

15 **Code Civ. Proc. § 720.260 (amended). Undertaking by creditor**
16 **where third party claims security interest or lien**

17 SEC. _____. Section 720.260 of the Code of Civil Procedure is
18 amended to read:

19 720.260. (a) If the creditor within the time allowed under
20 subdivision (b) of Section 720.240 either files with the levying
21 officer an undertaking that satisfies the requirements of this section
22 and a statement that satisfies the requirements of Section 720.280 or
23 makes a deposit with the levying officer of the amount claimed
24 under Section 720.230:

25 (1) The levying officer shall execute the writ in the manner
26 provided by law unless, in a case where the creditor has filed an
27 undertaking, the secured party or lienholder files an undertaking to
28 release the property pursuant to Chapter 6 (commencing with
29 Section 720.610).

30 (2) After sale, payment, or delivery of the property pursuant to
31 the writ, the property is free of all claims or liens of the secured
32 party or lienholder for which the creditor has given the
33 undertaking or made the deposit.

34 (b) Subject to Sections 720.770 and 996.010, unless the creditor
35 elects to file an undertaking in a larger amount, the amount of the
36 undertaking filed by the creditor under this section shall be in the
37 amount of:

38 ~~(1) Except as provided in paragraph (2), seven thousand five~~
39 ~~hundred dollars (\$7,500), or twice the amount of the execution lien~~
40 ~~as of the date of levy or other enforcement lien as of the date it was~~
41 ~~created, whichever is the lesser amount.~~

42 ~~(2) In a limited civil case, two thousand five hundred dollars~~
43 ~~(\$2,500), ten thousand dollars, or twice the amount of the execution~~
44 ~~lien as of the date of levy or other enforcement lien as of the date it~~
45 ~~was created, whichever is the lesser amount.~~

1 (c) An undertaking given by the creditor under this chapter
2 shall:

3 (1) Be made in favor of the secured party or lienholder.

4 (2) Indemnify the secured party or lienholder against any loss,
5 liability, damages, costs, and attorney's fees, incurred by reason of
6 the enforcement proceedings.

7 (3) Be conditioned on a final judgment that the security interest
8 or lien of the third person is entitled to priority over the creditor's
9 lien.

10 (d) If the creditor is a public entity exempt from giving an
11 undertaking, the public entity shall, in lieu of filing the
12 undertaking, file with the levying officer a notice stating that the
13 public entity opposes the claim of the third person. When so filed,
14 the notice is deemed to satisfy the requirement of this section that
15 an undertaking be filed.

16 **Comment.** Section 720.260 is amended to provide for an
17 undertaking of \$10,000 (or twice the amount of the execution lien,
18 whichever is less), regardless of the jurisdictional classification of
19 the case. The \$10,000 undertaking amount is the same as the
20 amount of an attachment undertaking. See Section 489.220
21 (attachment undertaking).

22 **Waiver of Jury (Code Civ. Proc. § 631)**

23 Code of Civil Procedure Section 631 should be amended along the following
24 lines:

25 **Code Civ. Proc. § 631 (amended). Waiver of trial by jury**

26 SEC. _____. Section 631 of the Code of Civil Procedure is
27 amended to read:

28 631. (a) Trial by jury may be waived by the several parties to an
29 issue of fact in any of the following ways:

30 (1) By failing to appear at the trial.

31 (2) By written consent filed with the clerk or judge.

32 (3) By oral consent, in open court, entered in the minutes or
33 docket.

34 (4) By failing to announce that a jury is required, at the time the
35 cause is first set for trial, if it is set ~~upon~~ on notice or stipulation, or
36 within five days after notice of setting if it is set without notice or
37 stipulation.

38 (5) By failing to deposit with the clerk, or judge, advance jury
39 fees 25 days ~~prior to~~ before the date set for trial, except in unlawful
40 detainer actions where the fees shall be deposited at least five days
41 ~~prior to~~ before the date set for trial, or as provided by subdivision
42 (b). The advance jury fee shall not exceed the amount necessary to

1 pay the average mileage and fees of 20 trial jurors for one day in the
2 court to which the jurors are summoned.

3 (6) By failing to deposit with the clerk or judge, promptly after
4 the impanelment of the jury, a sum equal to the mileage or
5 transportation (if allowed by law) of the jury accrued up to that
6 time.

7 (7) By failing to deposit with the clerk or judge, at the beginning
8 of the second and each succeeding day's session a sum equal to one
9 day's fees of the jury, and the mileage or transportation, if any.

10 (b) ~~In a superior court action, other than a limited civil case, if~~
11 ~~a jury is demanded by either party in the memorandum to set the~~
12 ~~cause for trial a party and the party, prior to trial, by announcement~~
13 ~~or by operation of law, waives a trial by jury, then all adverse~~
14 ~~parties that party shall promptly notify all other parties of the~~
15 ~~waiver, in writing or in open court. Each party adverse to the party~~
16 ~~who waived the jury shall have five days following the receipt of~~
17 ~~the notice of the waiver to file and serve a demand for a trial by~~
18 ~~jury and to deposit any advance jury fees that are then due. If the~~
19 ~~party who waived a jury does not promptly notify all other parties~~
20 ~~of the waiver, any other party, or the clerk or judge, may provide~~
21 ~~notice of the waiver, but is not required to do so. Where a party~~
22 ~~receives more than one notice of the waiver, the five day period to~~
23 ~~file and serve a demand for a trial by jury and to deposit advance~~
24 ~~jury fees commences on receipt of the first notice.~~

25 (c) When the party who has demanded trial by jury either (1)
26 waives the trial upon or after the assignment for trial to a specific
27 department of the court, or upon or after the commencement of the
28 trial, or (2) fails to deposit the fees as provided in paragraph (6) of
29 subdivision (a), trial by jury shall be waived by the other party by
30 either failing promptly to demand trial by jury before the judge in
31 whose department the waiver, other than for the failure to deposit
32 the fees, was made, or by failing promptly to deposit the fees
33 described in paragraph (6) of subdivision (a).

34 (d) The court may, in its discretion upon just terms, allow a trial
35 by jury although there may have been a waiver of a trial by jury.

36 **Comment.** Subdivision (b) of Section 631 is amended to apply to
37 both limited and unlimited civil cases. This codifies existing law.
38 See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 &
39 Comment. For unlimited civil cases, see Section 88. For waiver of a
40 jury in a criminal case, see Cal. Const. art. I, § 16.

41 Subdivision (b) is also amended to delete the reference to the
42 memorandum to set the cause for trial. The reference is obsolete
43 because an at-issue memorandum is no longer required in most
44 cases. See R. Weil & I. Brown, Jr., *California Practice Guide: Civil*
45 *Procedure Before Trial, Case Management and Trial Setting* § 12:101,
46 at 12(I)-36 (2000).

1 As amended, subdivision (b) also clarifies that the party who
2 waives a jury after demanding one is responsible for providing
3 notice of the waiver. If that party fails to provide notice of the
4 waiver as required, another party (or the clerk or judge) may
5 provide the notice instead. Failure to provide timely notice may be
6 grounds for a continuance or other remedial action. See *Leslie v.*
7 *Roe*, 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157 (1975).

8 Technical changes are also made for conformity with preferred
9 drafting style.

10 STUDY K-500 – EVIDENCE CODE CHANGES REQUIRED BY
11 ELECTRONIC COMMUNICATIONS

12 The Commission considered Memorandum 2000-53 and its First Supplement,
13 concerning revision of the Evidence Code to accommodate electronic
14 communications. The Commission directed the staff to prepare and circulate a
15 tentative recommendation revising Evidence Code Sections 917 and 952 along
16 the lines proposed by Judge Harvey:

17 **Evid. Code § 917 (amended). Presumption that certain**
18 **communications are confidential**

19 SEC. _____. Section 917 of the Evidence Code is amended to read:

20 917. (a) Whenever a privilege is claimed on the ground that the
21 matter sought to be disclosed is a communication made in
22 confidence in the ~~course of the lawyer-client, physician-patient,~~
23 ~~psychotherapist-patient, clergyman-penitent, or husband-wife~~
24 relationship, as provided in Sections 952, 980, 992, 1012, 1032,
25 1035.4, or 1037.2, the communication is presumed to have been
26 made in confidence and the opponent of the claim of privilege has
27 the burden of proof to establish that the communication was not
28 confidential.

29 (b) A communication between a client and lawyer, a patient and
30 physician, a patient and psychotherapist, a penitent and clergyman,
31 a husband and wife, a victim and sexual assault counselor, or a
32 victim and domestic violence counselor is not deemed lacking in
33 confidentiality solely because the communication is transmitted by
34 facsimile, cellular telephone, or other electronic means between the
35 parties.

36 **Evid. Code § 952 (amended). Confidential communication**
37 **between client and lawyer**

38 SEC. _____. Section 952 of the Evidence Code is amended to read:

39 952. As used in this article, “confidential communication
40 between client and lawyer” means information transmitted
41 between a client and his or her lawyer in the course of that

1 relationship and in confidence by a means which, so far as the client
2 is aware, discloses the information to no third persons other than
3 those who are present to further the interest of the client in the
4 consultation or those to whom disclosure is reasonably necessary
5 for the transmission of the information or the accomplishment of
6 the purpose for which the lawyer is consulted, and includes a legal
7 opinion formed and the advice given by the lawyer in the course of
8 that relationship. ~~A communication between a client and his or her~~
9 ~~lawyer is not deemed lacking in confidentiality solely because the~~
10 ~~communication is transmitted by facsimile, cellular telephone, or~~
11 ~~other electronic means between the client and his or her lawyer.~~

12 The tentative recommendation should also solicit input on whether any other
13 revisions of the Evidence Code are warranted to address electronic
14 communications.

15 After preparing but before circulating the tentative recommendation, the staff
16 should send it to Judge Harvey and the Commissioners for review. If Judge
17 Harvey or any of the Commissioners desire to raise an issue relating to the
18 proposal before it is circulated, the matter should be scheduled for consideration
19 at a Commission meeting.

20 STUDY L-4003 – FAMILY CONSENT IN HEALTH CARE
21 DECISIONMAKING FOR ADULTS

22 The Commission considered Memorandum 2000-49 presenting an overview
23 of the issues in the area of statutory surrogate health care decisionmaking (family
24 consent) and a redrafted proposal. The Commission discussed the new draft and
25 other alternatives and heard the views of interested persons.

26 The Commission directed the staff to prepare a revised draft recommendation
27 for consideration at the next meeting. The new version would make a number of
28 revisions in the “November 1999 Draft,” which was attached to the
29 memorandum.

30 **Consensus Surrogate**

31 The priority scheme in Section 4712 should be revised to provide a special
32 priority for a surrogate selected by the consensus of other surrogate candidates
33 (spouse, domestic partner, children, parents, siblings, grandchildren, individuals
34 with close personal relationship). By “consensus” the statutory rule would mean
35 unanimity of the surrogate candidates, but the statute should not attempt to

1 implement voting procedures or other technical rules. The consensus would be
2 manifested as appropriate under the circumstances, and would depend on notice
3 to and communication among interested parties.

4 Reasonable efforts to inform the appropriate persons would be needed, but it
5 is not expected that participation of distant, uninvolved relatives or estranged
6 persons within the potential surrogate class would be required to form the
7 consensus.

8 The effect of the consensus was not finally settled. The consensus surrogate
9 could be given the highest priority level, with no statutory approval authority on
10 the part of the primary physician or ethics committee, or could be given a
11 stronger presumption, but preserving some discretion to reject the selection.

12 **Successive Surrogates**

13 The primary physician should not be able to reject a surrogate and then select
14 a new one. The Comment to the relevant sections (Sections 4712 and 4716 in the
15 November 1999 Draft) should make this clear. The new draft should also include
16 the proposed rule forbidding selection or rejection of a surrogate based on health
17 care decisions the surrogate is making or is likely to make.

18 **Judicial Procedures**

19 The Commission discussed the possibility of providing for quick court access
20 through expedited proceedings to resolve issues concerning statutory surrogates.
21 Commentators suggested that existing procedures served adequately in terms of
22 timing. The Commission decided that the court should be given explicit
23 authority to review the selection and qualifications of a surrogate under Section
24 4766 in the Health Care Decisions Law. The statute should not permit interested
25 persons to petition for selection of a surrogate independent from the statutory
26 selection mechanism.

27 **STUDY M-200 – CRIMINAL SENTENCING STATUTES**

28 The Commission considered Memorandum 2000-52 discussing alternative
29 approaches to improving the organization of criminal sentencing statutes. The
30 Commission decided against attempting a complete reorganization of sentencing
31 statutes at this time. Instead, the Commission will develop a tentative
32 recommendation for the nonsubstantive reorganization of those statutes
33 providing a sentence enhancement where criminal conduct involves the

1 possession or use of a weapon or causes death or great bodily injury. If the
2 proposed reorganization is successful, the Commission will consider whether to
3 propose the nonsubstantive reorganization of other types of sentencing
4 provisions.

5 STUDY N-117 – SEPARATION OF FUNCTIONS IN DMV HEARINGS

6 The Commission considered Memorandum 2000-48 and its First and Second
7 Supplements, relating to separation of functions in DMV hearings. After
8 considering fairness and fiscal concerns, and the prior history of Commission
9 recommendations in this area, the Commission decided to recommend neither
10 expansion of separation of functions to divers license hearings nor elimination of
11 separation of functions from special certificate hearings. This decision does not
12 preclude advocates on either side from sponsoring their own legislation on these
13 matters.

☐ APPROVED AS SUBMITTED

Date

☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary